

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 20, 2008

**TYRICE L. SAWYERS v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 92-C-1450     Steve Dozier, Judge**

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**No. M2007-02867-CCA-R3-PC - Filed December 31, 2008**

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The petitioner, Tyrice L. Sawyers, appeals from the Criminal Court for Davidson County's summary dismissal of his petition for post-conviction relief. Although he filed his petition more than fifteen years after his judgments became final, he argues that due process violations require that the statute of limitations be tolled. Upon review of the record and applicable law, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and JAMES CURWOOD WITT, JR., J., joined.

Tyrice L. Sawyers, Atlanta, Georgia, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; for the appellee, State of Tennessee.

**OPINION**

**Facts.** On November 17, 1992, the petitioner pleaded guilty to two counts of facilitation of aggravated burglary, a Class D felony. He agreed upon and received an effective sentence of two years, as a Range I, standard offender. No appeal was taken from the petitioner's conviction and sentence. On November 21, 2007, the petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel and that his plea was involuntary. The petitioner claims that counsel's advice "led [him] to believe that he could not seek appellate review, or post-conviction relief of any kind. . . ." His petition also states that he is currently in federal custody in Georgia and without access to legal materials to challenge the "allegedly invalid conviction in [the instant case]." The post-conviction court denied the petition with a written order finding that the petition was time-barred and that no exceptions were presented to toll the statute of limitations. The petitioner subsequently filed a timely notice of appeal to this court.

Analysis. As an initial matter, we are reluctant to address the petitioner's claims because his sentences expired over ten years ago. However in Sibron v. State of New York, 392 U.S. 40, 88 S.Ct. 1889, 1890 (1968) and United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 1592, (1982) the United States Supreme Court recognized that:

[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. It also recognize[d] that the government has an interest in finality of its criminal judgments and in order to obtain collateral relief a petitioner must clear a significantly higher hurdle than would exist on direct appeal . . . when a collateral attack is made against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed toward review or by the affirmance of the conviction on appeal.

Howard Lee White v. State, No. 1101, 1987 WL 9717, at \*5 (Tenn. Crim. App. at Knoxville, April 21, 1987).

Additionally, under Tennessee law, a person must be "in custody" to seek post-conviction relief. See T.C.A. § 40-30-102(a). "[I]n custody" for purposes of the statute means any possible restraint on liberty even though the defendant's sentence has been fully served. See State v. McCraw, 551 S.W.2d 692, 694 (Tenn. 1977). In regard to the petitioner's present status, he alleges the following within his petition: (1) that he is currently in custody serving an enhanced federal sentence imposed by the United States District Court for the Middle District of Tennessee; and (2) that the facilitation of aggravated burglary convictions were used to enhance his sentence as an "Armed Career Criminal" pursuant to the Federal Sentencing Guidelines. Accordingly, because the petitioner is still subject to collateral legal consequences of the expired sentences, we will review the denial of post-conviction relief. Id.; see also McCray v. State, 504 S.W.2d 773, 774 (Tenn. Crim. App. 1973).

When the petitioner's convictions became final, the statute of limitations for post-conviction procedures was three years. T.C.A. § 40-30-102 (repealed 1995); see also Holston v. State, No. 02C019609-CR-00298, 1997 WL 421212, at \*1-2 (Tenn. Crim. App., at Jackson, July 28, 1997). However, this petition is governed by the Post-Conviction Procedure Act of 1995 (PCPA) because the petitioner's three-year statute of limitation period did not expire until after implementation of the 1995 PCPA. Consequently, the petitioner was given one year from May 10, 1995, the effective date of the statute, to file for post-conviction relief. Id. Notwithstanding this provision, a person in custody under a sentence of a court of this state must petition for post-conviction relief within one year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one year of the date on which the judgment becomes final. T.C.A. § 40-30-102 (Supp. 1996). The statute stresses that "[t]ime is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year

limitations period is an element of the right to file the action and is a condition upon its exercise.” Id. A trial court shall not have jurisdiction to consider a petition filed after the expiration of the limitations period unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

T.C.A. § 40-30-102(b)(1-3) (2006).

In addition, the Tennessee Supreme Court has held that the due process clauses of the state and federal constitutions require that the claimant be given “a reasonable opportunity to have the claimed issue heard and decided.” Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992) (citations omitted). Where such an opportunity did not exist, a rigid application of the time-bar would deprive a petitioner of due process of law. See Sands v. State, 903 S.W.2d 297, 300 (Tenn. 1995). In Sands, the Tennessee Supreme Court set forth a three-step process for determining whether the Burford rule applied in a given factual situation:

(1) determine when the limitations period would normally have begun to run;

(2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and,

(3) if the grounds are “later-arising,” determine whether a strict application of the limitations period would effectively deprive the petitioner of a reasonable opportunity to present the claim.

Id. Thus, a reviewing court may also consider an untimely petition for post-conviction relief if applying the statute of limitation would deny the petitioner due process. Burford, 845 S.W.2d at 208.

Here, the petitioner does not list any ground that would make him eligible for the exceptions to the one-year statute of limitations and essentially concedes that his petition is time-barred. See T.C.A. § 40-30-102(b) (2006). Relying primarily on Williams v. State, 44 S.W.3d 464 (Tenn. 2001), he claims that trial counsel's alleged misrepresentations constitute violations of due process which should toll the statute of limitations. The State argues the petition was properly dismissed because it was barred by the one-year statute of limitations. The State further contends, even if the petitioner's claims are true, he is not entitled to relief. We agree with the State.

The petitioner's reliance on Williams is simply misplaced. In Williams, based on the petitioner's counsel's failure to timely notify the petitioner of his withdrawal from his case, the Tennessee Supreme Court concluded that "[f]urther development of the record [was] required to determine the precise circumstances surrounding the [petitioner's] understanding of his relationship to counsel." Id. at 471. On remand, the evidentiary hearing was limited to determining: "(1) whether due process tolled the statute of limitations so as to give [the petitioner] a reasonable opportunity after the expiration of the limitations period to present his claim in a meaningful time and manner; and (2) if so, whether [the petitioner's] filing of the post-conviction petition . . . was within the reasonable opportunity afforded by the due process tolling." Id. The court was concerned that "[the petitioner] might have been denied the opportunity to challenge his conviction in a timely manner through no fault of his own but because of the possible misrepresentation of his counsel." Id. at 468.

This court analyzed Williams in Craig Robert Nunn v. State, No. M2005-01404-CCA-R3-PC, 2006 WL 680900, at \*5 (Tenn. Crim. App., at Nashville, Mar. 17, 2006), and determined that a hearing on due process concerns is not required every time a petitioner alleges that the untimeliness of his petition is due to his trial or appellate counsel's negligence. Requiring a hearing every time a due process concern is raised "is clearly inconsistent with the plain language of the post-conviction statute requiring a trial judge to summarily dismiss an untimely petition without . . . a hearing." Craig Robert Nunn, 2006 WL 680900, at \*5 (quoting Williams, 44 S.W.3d at 476 (Drowta, J., dissenting)). Additionally, in Williams, the Supreme Court clarified its holding and stated:

[W]e are not holding that a petitioner may be excused from filing an untimely post-conviction petition as a result of counsel's negligence. Instead, the focus here is only upon trial and appellate counsel's alleged misrepresentation in failing to . . . notify the petitioner that no application for permission to appeal would be filed in [the Tennessee Supreme] Court.

Williams, 44 S.W.3d. at 468 n. 7.

Raymond Dean Willis v. State, No. 01C01-9211-CR-00359 (Tenn. Crim. App., at Nashville, Oct. 21, 1993), perm. to appeal denied (Tenn.1994) squarely addressed this issue. In Willis, the

petitioner similarly argued that the application of the statute of limitations to his petition violated his due process rights because his attorney did not inform him of the post-conviction procedure causing his guilty plea to be unknowing and involuntary. Id. at 2-3. This court replied:

The petitioner impliedly argues that his petition is untimely because his attorney negligently failed to advise him of this avenue of relief and that it is fundamentally unfair to expect him to file timely when he has no information on which to proceed. However, the petitioner would still not be entitled to relief because ignorance of the statute of limitation is not an excuse for late filing. Paul R. Spence v. State, No. 968 (Tenn. Crim. App., at Knoxville, Nov. 8, 1991), perm. to appeal denied, (Tenn. March 16, 1992); State v. Edman, 444 N.W.2d 103 (Iowa App. 1989) (claimed lack of knowledge of post-conviction statute of limitation, due to ineffective assistance of counsel, was not grounds for exception from effects of limitation).

Id. at 2.

Additionally, Williams and Craig Robert Nunn are factually distinct from the instant case. Unlike the petitioners in Williams or Craig Robert Nunn, the petitioner fails to state any of the circumstances surrounding when he became aware of his rights to an appeal. His petition for post-conviction relief was filed more than fifteen years after the judgment became final and ten years after they had expired. The petitioner does not explain in any way his lengthy delay in filing this petition for post-conviction relief. See Richard A. Emmitt v. State, No. M2004-00564-CCA-R3-PC, 2005 WL 639133, at \*6 (Tenn. Crim. App., at Nashville, Mar. 16, 2005) (“There is no indication that he was under the mistaken impression that trial counsel continued to represent him after this court affirmed his convictions, and the appeal simply was taking nearly two decades.”) perm. to appeal denied (Tenn. June 27, 2005) ; see also Eric Wright v. State, No. W2001-00386-CCA-R3-PC, 2001 WL 1690194, at \*3 (Tenn. Crim. App., Jackson, Dec. 17, 2001) (Tipton, P.J., dissenting) (“Absent any allegation to justify the petitioner’s years of inaction, for example, counsel’s continued assertion that the case was on appeal, an evidentiary hearing is unwarranted.”). Finally, applying Sands, the grounds for relief were not “later-arising” because the alleged attorney misconduct occurred before the expiration of the limitations period. Accordingly, based on this record, we conclude that no facts exist that would require a tolling of the statute of limitations for due process concerns and no other exceptions to the one-year statute of limitations apply. See Johnny L. McGowan, Jr. v. State, No. M2008-00244-CCA-R3-PC, 2008 WL 2229123, at \*1 (Tenn. Crim. App., at Nashville, May 30, 2008), perm. to appeal denied (Tenn. Aug. 25, 2008), cert. denied, 77 U.S.L.W. 3296 (U.S. Nov. 17, 2008) (No. 08-6439).

**Conclusion.** We conclude that the petition for post-conviction relief was filed outside the one-year statute of limitations and that the petitioner has not shown any facts which would require that the statute of limitations be tolled. Accordingly, we affirm the dismissal of the petition as time-barred.

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CAMILLE R. McMULLEN, Judge